No. 16,298

IN THE

United States Court of Appeals

For the Ninth Circuit

VIRGINIA J. KING, as Administratrix of the Estate of John Elvins King,
Appellant,

vs.

PAN AMERICAN WORLD AIRWAYS, a corporation,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

JOSEPH EDWARD SMITH,
WM. SHANNON PARRISH,
JOHN B. LEWIS,
Financial Center Building,
Oakland 12, California,
JOHN B. KRAMER,
1212 Broadway,
Oakland 12, California,
Proctors for Appellant and Petitioner.

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Appeal from the United States District Court for the Northern District of California, Southern Division.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable Albert Lee Stephens, Oliver D. Hamlin and Gilbert H. Jertberg, United States Court of Appeals for the Ninth Circuit:

Appellant, Virginia J. King, as administratrix of the estate of John Elvins King, hereby respectfully petitions for a rehearing in the above-entitled action, and urges the following in support thereof:

I.

PRELIMINARY STATEMENT.

(a) This petition is presented under Rule 23 of this Court, and within the time of the extension granted on October 14, 1959.

(b) On February 24, 1959, the opinion of the United States Supreme Court was filed in the case of *The Tungus v. Skovgaard* .... U.S. ...., 3 L. ed. 2d 524, 79 S. Ct. .... The Supreme Court in *The Tungus* gave an interpretation of the Death on the High Seas Act (March 30, 1920, c. III, Sections 1-7, 41 Stat. 537, 46 USCA Sections 761-767) that would appear to be contrary to the views expressed by this court on its original hearing. The Supreme Court held that the reservation of rights under State statutes by Section 7 of the Death on the High Seas Act, referred to the territorial waters of the State. This case did not come to the attention of appellant until after the case had been submitted.

(c) The decision of this United States Court of Appeals in interpreting the California Workmen's Compensation Act (California Labor Code Sections 3500 et seq.) is contrary to the interpretation of that Compensation Act given by the Supreme Court of California in the case of *North Pacific SS Co. v. Industrial Acc. Commission,* 174 C. 346, 163 Pac. 199, which case held that the California Compensation Act does not exclude Federal admiralty jurisdiction as to a tort on the high seas, but only restricts a suitor to the Industrial Accident Commission if the suitor elects to seek redress before a state tribunal. Appellant

firmly believes that a rehearing should be granted for these reasons which are hereinafter set forth in somewhat greater detail, and respectfully asks that the same be held *en banc.*

II.

IT IS ESSENTIAL TO THE UNIFORM APPLICATION OF THE LAW THAT THE INTERPRETATION OF A FEDERAL STATUTE BY THE UNITED STATES COURT OF APPEALS BE IN CONFORMITY WITH THE INTERPRETATION OF THE UNITED STATES SUPREME COURT.

The opinion of the court in *The Tungas,* supra, held that the federal court would enforce a State wrongful death act for a death occurring on the territorial waters of the State since the Death on the High Seas Act would not be applicable to such territorial waters. We quote from the opinion of the court:

> p 527 "We begin as did the Court of Appeals with the established principle of maritime law that in the absence of a statute there is no action for wrongful death. *The Harrisburg,* 119 U.S. 199, 30 L. ed. 358, 7 S. Ct. 140. Although Congress has enacted legislation, notably the Jones Act and the Death on the High Seas Act, providing for wrongful death actions in a limited number of situations, no federal statute is applicable to the present case; Skovgaard was not a seaman, and his death occurred upon the territorial waters of New Jersey."
>
> p 529 "The legislative history of the Death on the High Seas Act discloses a clear congressional purpose to 'leave unimpaired the rights under

> State statutes as to deaths on waters within the territorial jurisdiction of the States' ".

The opinion of the Supreme Court in *The Tungus v. Skovgaard* supra gives weight to and would appear to justify a quotation from District Judge Moscowitz of the Eastern District of New York from his opinion in the case of *Echavarria v. Atlantic & Caribbean Steam Nav. Co.,* 10 F. Supp. 677:

> p 678 "With the enactment of the Federal Death Act, the conclusion cannot be avoided that the death statutes of the several states were superseded so far as they had been theretofore applied to death on the high seas.
>
> It is clear that the Congress could pass such an act under its power to regulate commerce and in pursuance of the constitutional provision extending the judicial power of the government to all cases of admiralty and maritime jurisdiction.
>
> Section 7 of the act (46 USCA Sec. 767) indicates a carefully devised congressional plan to leave unaffected the operation of state death statutes over waters within one league of shore. Section 1 (46 USCA Sec. 761) makes no mention of the state statutes, and there is implied in that omission the congressional intent that their operative force with respect to torts committed more than three miles from land be ended. The state statutes, diverse in their terms and conflicting in remedies, afforded a poor substitute for a uniform act which Congress alone could legislate. They applied, none the less, upon the theory that the states could enact laws creating rights concerning a subject within the domain of the paramount

> authority of Congress to legislate so long as Congress failed to enact a statute relating to the same subject. In view of the congressional action, they can no longer be applied to American ships on the high seas."

III.

THE INTERPRETATION OF STATE STATUTES IS THE FUNCTION OF THE HIGHEST COURT OF THE STATE WHOSE STATUTE IS UNDER CONSIDERATION AND THE FEDERAL COURTS ARE OBLIGATED TO FOLLOW THE INTERPRETATION GIVEN BY SAID STATE COURT.

That the interpretation of State statutes is the function of the highest court of the State whose statute is under consideration is too generally accepted to warrant other than a nominal citation. *The Tungus* supra. While there are exceptions, there are none that appear relevant in the case before us. The California Supreme Court in 1917, about three years prior to the enactment of the Jones Act and the Death on the High Seas Act decided the case of *North Pacific SS. Co. v. Industrial Acc. Commission* supra. The essential facts of the case and procedure are sufficiently set out in the first paragraph of the opinion:

> p 347 "The respondent the Industrial Accident Commission of the state of California assumed jurisdiction and made its award in the case of a seaman in the employ of the petitioner, who was injured while his vessel, owned by citizens of this state, was upon the high seas. Application for writ of review was granted by this court. This application was based upon the contentions that the United States District Courts, under their ad-

> miralty and maritime jurisdiction, were alone empowered to deal with the question, and that the Industrial Compensation Act of California (St. 1913, p. 279), in so far as it was sought to apply it to seamen, was an unconstitutional usurpation of that jurisdiction."

The court then declared that the California Compensation Act was not intended to oust or supersede Federal admiralty jurisdiction but only limit the claimant to the Industrial Accident Commission in the event that he elected to seek redress in a state tribunal. The decision of the court on the point is quoted as follows:

> p 355 "In State ex rel. Jarvis v. Daggett, 87 Wash. 253, 151 Pac. 648, L.R.A. 1916A, 446, the Supreme Court of that state expressed a contrary view, holding that its Compensation Act was not meant to apply to maritime injuries and torts. It based its conclusion upon two features of the Washington act, which are likewise found in the California statute. One of these was the provision abolishing all other remedies and limiting the right to compensation to proceedings under the provisions of the act itself. But concerning this matter we think it sufficient to say that the similar language of our own act will not be construed as designed to exclude admiralty from a jurisdiction which it possesses, but merely to limit suitors in the tribunals of the state to the forum provided for the determination of these questions, viz. the Industrial Accident Commission. So understood, the language imports no more than a declaration that, if a suitor shall seek redress in personam for such an injury before a

> state tribunal, he must go before the Accident Commission and the Accident Commission alone."

Appellant does not believe that he can paraphrase the above statement of the law to further clarify the position of the California Supreme Court.

The Federal court of admiralty obviously had jurisdiction. The language of the court in *The Plymouth (Hough v. Western Transp. Co.),* 3 Wall. 20, 18 L. ed. 125 is as follows:

> "The jurisdiction of the admiralty over maritime torts does not depend upon the fact that the injury was inflicted by the vessel, but upon the locality—the high seas or navigable waters—where it occurred."

This language has been approved through the years, in land mark cases such as *Grant Smith Porter Ship Co. v. Rohde,* 257 U.S. 469, 66 L. ed. 321, and as recently as 1959, *Kermarec v. Transatlantique,* .... U.S. ...., 3 L. ed. 2d 550. Sometimes the principle is stated more firmly as in *Berwind-White Coal Mining Co. v. City of N. Y.,* 135 Fed. 2d 443:

> "The place where torts are committed, and not their nature, is decisive on the question of admiralty jurisdiction. The Belfast v. Boon, 7 Wall. 624, 637, 19 L. ed. 266."

but always consistently. Judge Goodman in the case of *Wilson v. Transocean Airlines,* 121 F. Supp. 85, page 92 used the following language:

> "Admiralty tort jurisdiction has never depended upon the nature of the tort or how it came about, but upon the locality where it occurred."

With this background it is difficult for appellant to rationalize the statement of Judge Goodman in the case below, *King v. Pan American World Airways,* 166 F. Supp. 136, when he stated at page 139:

> "Indeed the only aspect of this case which gives it any maritime flavor whatsoever is the locale of of the accident."

Since the enactment of the Death on the High Seas Act, appellant knows of no case in which admiralty jurisdiction has not attached for a death on the *high seas* caused by wrongful act, neglect, or default.

North Pacific SS. Co. v. Industrial Acc. Commission, supra, is not in conflict with *Alaska Packers Ass'n v. Marshall,* 95 Fed. 2d 279 (9 Cir.), for three reasons. First no cause of action was stated under admiralty law. Second there is no contention that the compensation claim ousted Federal jurisdiction. Third the case of *Alaska Packers Ass'n v. Alaska Industrial Board,* 88 F. Supp. 172, 174 indicates that the injury in the *Marshall* case was in Bristol Bay, and leaves open the question whether the deaths occurred within one marine league of the shore.

IV.

APPELLANT URGES THAT THE OPINION OF THE COURT FILED AUGUST 27, 1959 BE RECONSIDERED, THAT THE SAME BE VACATED, AND THAT THE JUDGMENT OF THE DISTRICT COURT BE REVERSED.

A.

General Statement of the Law Applicable.

The Death on the High Seas Act is a federal statute, which creates a cause of action for a death on the high seas enforceable in the federal courts of admiralty. Section 1 of the Act reads as follows:

> "Whenever the death of a person shall be caused by wrongful act, neglect, or default occurring on the high seas beyond a marine league from the shore of any State, or the District of Columbia, or the Territories or dependencies of the United States, the personal representative of the decedent may maintain a suit for damages in the district courts of the United States, in admiralty, for the exclusive benefit of the decedent's wife, husband, parent, child, or dependent relative against the vessel, person, or corporation which would have been liable if death had not ensued."

As to deaths occurring on the high seas this federal statute supersedes state wrongful death acts. *Lingren v. United States,* 281 U.S. 38, 74 L. ed. 696, 50 S. Ct. 207; *Wilson v. Transocean Airlines,* 121 F. Supp. 85. The Constitution of the United States (Article III, Sec. 2, par. 1) declares that the judicial power of the United States shall extend "to all cases of admiralty and maritime jurisdiction." In the judiciary act of Congress of 1789 (Act Sept. 24,

1789, c. 20, 1 Stat. 73) the granting of admiralty jurisdiction to the district court was accompanied by a "saving to suitors in all cases the right of a common-law remedy where the common law is competent to give it." *The Moses Taylor,* 4 Wall. 411, 431, 18 L. ed. 397 says of the savings clause "it is not a remedy in the common law courts which is saved, but a common-law remedy". The case of *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 61 L. ed. 1086, 37 S. Ct. 524, holds that a Workman's Compensation Act is not such a remedy as is included in the savings clause, using the following words:

> p 218 "The remedy which the Compensation Statute attempts to give is of a character wholly unknown to the common law, incapable of enforcement by the ordinary processes of any court, and is not saved to suitors from the grant of exclusive jurisdiction."

The States having granted to the federal government jurisdiction in admiralty and maritime matters, the jurisdiction of the federal courts is quite apart from and independent of any state statute creating a liability or giving a remedy. The federal law of admiralty is created by federal statute and by decisions of the federal courts of admiralty. *The Tungus* supra; *Southern Pacific Co. v. Jensen* supra; *Wilburn Boat Co. v. Fireman's Fund Ins. Co.,* 348 U.S. 310, 99 L. ed. 337, 342, 75 S. Ct. 368; *Washington v. Dawson & Co.,* 264 U.S. 219, 68 L. ed. 646. The navigable waters over which the federal government exercises admiralty and maritime jurisdiction are divided into two areas,

namely, the high seas, and State territorial waters; and the distinction is frequently determinative in the cases. *Southern Steamship Co. v. National Lab. Rel. Bd.,* 316 U.S. 31, 86 L. ed. 1246, 62 S. Ct. 886; *United States v. Rogers,* 150 U.S. 255, 37 L. ed. 1071, 14 S. Ct. 109; *Imbrovek v. Hamburg-American Steam Packet Co.,* 190 F. 229, affirmed 193 F. 234. The above observations and distinctions are of particular importance in the case at bar because until the case of *The Tungus* supra it was not entirely clear that the reservation of rights to the States by Section 7 of the Death on the High Seas Act, referred only to the territorial waters of the state and territories.

B.

A Cause of Action Conferred Upon a Person by a Federal Statute and Enforceable in a Federal Court May Not Be Extinguished by a State Statute.

Restricting ourselves to the facts in the case now before us, we may observe that there are two sources of power which may create a cause of action for death on the high seas. These two sources are the State government, *The Tungus* supra, and *The Hamilton,* 257 U.S. 398, 52 L. ed. 264, 28 S. Ct. 133, and the federal government, *The Tungus* supra. The State government loses its power once the federal government has entered the field, *Southern Pacific Co. v. Jensen* supra. Except to the extent that the forum in which the remedy may be enforced is limited by the terms of the statute creating the cause of action, state courts will enforce federal law, and federal courts will en-

force state law. *The Tungus* supra; *Western Fuel Co. v. Garcia,* 257 U.S. 233, 66 L. ed. 210, 42 S. Ct. 89.

The two statutes which we are considering in the case now before this court each provide a restriction as to the forum in which the remedy may be pursued. The Death on the High Seas Act may only be enforced in a Federal Court of Admiralty, *Wilson v. Transocean Airlines,* 121 F. Supp. 85, and the California Workmen's Compensation Act may only be enforced only by the California Industrial Accident Commission. *North Pacific SS. Co. v. Industrial Acc. Commission* supra.

Where the source of the authority which creates a cause of action is the State, that State [subject only to the limitations provided by the United States Constitution, and federal statutes implementing that Constitution] may alter a right or remedy, may substitute a new right or remedy, or terminate the right and remedy completely. California Constitution Art. IV, Sec. 1; *The Tungus* supra; *Caldarola v. Eckert,* 332 U.S. 155, 91 L. ed. 1968, 67 S. Ct. 1569; *Macmillan Co. v. Clarke,* 184 C. 491; *Western Indemnity Co. v. Pillsbury,* 170 C. 686; *People v. Coleman,* 4 C. 46. The fact that a state statute had been enforced in a federal court would not prevent the state terminating or changing the state right and thus indirectly depriving the federal court of the power to thereafter enforce a state statute. However this is entirely different from a holding that the state may by statute deprive a person of a federal right enforceable in a federal court. *The Lottawanna,* 21 Wall. 558, 22 L. ed. 654;

Butler v. Boston & Savannah S. Co., 130 U.S. 527, 32 L. ed. 1017, 9 S. Ct. 612.

If we assume for the moment that there was no California Workmen's Compensation Act, then the application of the Death on the High Seas Act in the present case, would follow without question. If we would further assume that the California Workmen's Compensation Act contained no provision limiting the remedy to one under the Compensation Act, no reason would exist for not applying the Death on the High Seas Act.[1] If this be sound, then the only factor that would serve to deprive a person of a remedy in a federal court based upon a federal statute, covering a subject over which federal jurisdiction is granted by the United States Constitution, would be a provision of a State statute cancelling such a remedy. If such be the power of the State statute, then it is the State and not the federal government that is the superior power on matters concerning the high seas.

Before bringing this petition to a conclusion, attorneys for appellant feel obliged to mention one further subject, which though of infinite practical significance is not truly a matter of law, and is stated here only because the subject was given some consideration in the opinion filed by this court. Libelant is told that it is more advantageous to look toward the Compensation Act rather than the Death on the High Seas

[1]Whether or not the State could effectively legislate on an event occurring on the high seas is not considered here, as we are only considering for the moment the power of the State to limit federal power.

Act for a remedy. Counsel would suggest that the advantages to libelant if such were the case would be more theoretical than real. This conclusion is clearly demonstrated by the fact that this so called advantage is strongly urged by the respondent and as strongly declined by the libelant.

V.

CONCLUSION.

Wherefore, Appellant prays that this court's decision of August 26, 1959, be vacated, that a rehearing be granted *en banc* and, on rehearing, that the judgment of the Court below be reversed.

Dated, Oakland, California,
October 14, 1959.

Respectfully submitted,

JOSEPH EDWARD SMITH,
WM. SHANNON PARRISH,
JOHN B. LEWIS,
JOHN B. KRAMER,
Proctors for Appellant and Petitioner.

Certificate of Counsel

We hereby certify that in our judgment the Petition for a Rehearing in Virginia J. King, as administratrix of the estate of John Elvins King vs. Pan American World Airways, a corporation, No. 16,298, is well founded and that it is not interposed for delay.

John Edward Smith,
Wm. Shannon Parrish,
John B. Lewis,
John B. Kramer,
By John B. Kramer,
Proctors for Appellant and Petitioner.